

**Gingko Prod. Inc. v Guardian Life Ins.
Co. of Am.**

2007 NY Slip Op 32203(U)

July 16, 2007

Supreme Court, New York County

Docket Number: 0603520/2006

Judge: Barbara Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. BARBARA R. KAFNICK

PART 12

Justice

GINKGO PRODUCTION

INDEX NO.

603520/06

MOTION DATE

- v -

The GUARDIAN LIFE INSUR.

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JUL 20 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/16/07

[Signature]
BARBARA R. KAFNICK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X

GINGKO PRODUCTION INC., PLANTS
GOODBYE, INC., TIMOTHY A. DU VAL,
and DAGNY DU VAL,

DECISION/ORDER
Index No. 603520/06
Motion Seq. No. 001

Plaintiff,

-against-

THE GUARDIAN LIFE INSURANCE COMPANY
OF AMERICA, PARK AVENUE SECURITIES, LLC,
NRL ASSOCIATES, LTD., CHARLES A. CASANO,
GORDON & SANDERSON P.C. and SEXTER &
WARMFLASH, LLP,

Defendants.

BARBARA R. KAPNICK, J.:

FILED
JUL 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

In November 2004, plaintiffs Timothy A. Du Val and Dagny Du Val ("the Du Vals") settled claims for fraud, embezzlement and larceny against a former employee of plaintiff Plants Goodbye, Inc. ("PGI") in exchange for the payment of approximately \$900,000 by the employee.

Plaintiffs claim that prior to receiving the funds, the Du Vals sought tax advice from Robert Gordon of Gordon & Sanderson, P.C. ("G&S"), an accounting firm, and David Warmflash of Sexter & Warmflash ("S&W"), a law firm. G&S and S&W allegedly advised the Du Vals to form Gingko Production, Inc. ("Gingko") for the purpose of receiving the Recovered Funds.

Defendants allegedly recommended and sold to plaintiffs a pension plan under Section 412(i) of the Internal Revenue Code

designed to help shelter from taxes this one-time receipt of approximately \$900,000.

Plaintiffs allege that (a) defendants The Guardian Life Insurance Company of America ("Guardian") and Park Avenue Securities, LLC ("PAS") are the authors of the plan which allegedly consisted of two whole life insurance policies and two linked annuities; and (b) defendants NRL Associates, LTD. ("NRL") and Charles A. Casano ("Casano") are the insurance agents who sold the plan to the Du Vals.

Plaintiffs contend that G&S recommended the adoption of the plan, but defendant G&S vehemently denies this claim.

Plaintiffs further claim that the pension plan was inappropriate for them because it required additional funding of approximately \$3.5 million over 5 years, and that defendants NRL and Casano got an excessive undisclosed commission from the sale of the plan. Plaintiffs claim that they were unable to pay the required premiums and thus lost all the benefit of the insurance policies. As a result, plaintiffs allege that they will likely be obliged to pay excessive taxes, interest and possibly penalties to the IRS.

Plaintiffs Ginkgo, PGI and the Du Vals brought this action, seeking to recover damages (i) against all the defendants for fraudulent inducement (first cause of action);

(ii) against defendants NRL, Casano, PAS and Guardian for violation of General Business Law ("GBL") § 349 (second cause of action) and negligence (third cause of action); and

(iii) against defendants S&W and G&S for negligence/professional malpractice (fourth cause of action).

Defendant G&S has asserted counterclaims for:

(i) costs and sanctions pursuant to Part 130 of the Rules of the Chief Administrator of the Courts ("Rule 130") (first counterclaim);

(ii) damages arising out of the malicious prosecution initiated by Ginkgo and the Du Vals in connection with the commencement of an action in the United States District Court, Southern District of New York¹ (second counterclaim); and

(iii) damages to defendant's professional reputation and litigation expenses incurred as a result of plaintiffs' false and defamatory statements made in this action and the federal action (third counterclaim).

¹ That action, which alleged violations under ERISA, contained virtually the same factual allegations as those set forth in the Complaint in this action; the federal action was dismissed by Order of the Hon. George B. Daniels dated November 1, 2006 for failure to state a claim under ERISA.

Plaintiffs now move for an order pursuant to CPLR § 3211(a)(7) dismissing defendant G&S's counterclaims.

First counterclaim

Defendant G&S alleges that plaintiffs should be sanctioned on the ground that the Complaint falsely alleges that: "Mr. Gordon recommended that Gingko establish a pension plan pursuant to Section 412(i) of the Internal Revenue Code."

Plaintiffs argue that this counterclaim must be dismissed on the grounds, inter alia, that a counterclaim is not a proper mechanism for seeking sanctions under Rule 130.

Although "[a]n award of costs or the imposition of sanctions may be made either upon motion...or upon the court's own initiative, after a reasonable opportunity to be heard" (Section 130-1.1[d]), this Court finds that such relief is not properly pleaded as a counterclaim. See, Ocean Side Institutional Industries, Inc. v. Superior Laundry, 2007 WL 1175494 (Sup. Ct., Nassau Co.); King Enterprises Ltd. v. Mastro, 2001 WL 1328712 (Civ. Ct., N.Y. Co.)

Accordingly, the first counterclaim is dismissed without prejudice.

Second counterclaim

Plaintiffs argue that the second counterclaim fails to state a claim for malicious prosecution because it is supported by "vague allegations of reputational loss" and does not allege a 'special injury'. Engel v. CBS, 93 N.Y.2d 195, 207 (1999). See also, Wilhelmina Models, Inc. v. Fleisher, 19 A.D.3d 267 (1st Dep't 2005).

Defendant G&S argues that this portion of the motion is premature because no discovery has taken place.

However, whether or not said defendant sustained a 'special injury' is information which is already in its possession. Therefore, since G&S has failed to allege a 'special injury', the second counterclaim is dismissed with prejudice. See, Roberts v. 112 Duane Associates LLC, 32 A.D.3d 366 (1st Dep't 2006).

Third counterclaim

Plaintiffs argue that the third counterclaim fails to state a claim for defamation because defendant has not set forth particularized allegations of defamatory communications.

Defendant G&S, on the other hand, contends that the third counterclaim sufficiently identifies the offending statements; i.e., paragraph 18 of the Complaint in this action and paragraph 17 of the Federal Complaint which both allege that "Mr. Gordon

recommended that Gingko establish a pension plan pursuant to Section 412(i) of the Internal Revenue Code."

Plaintiffs argue that these statements are absolutely privileged since they were made in the content of judicial proceedings.

Defendant argues in opposition that "[t]his privilege is lost if abused, and is limited to statements which are pertinent to the subject matter of the lawsuit, made in good faith and without malice." Halperin v. Salvan, 117 A.D.2d 544, 548 (1st Dep't 1986). Defendant contends that the issue of whether the alleged statement was deliberately false and thus not 'pertinent' to the lawsuits cannot be resolved before discovery.

However, the Appellate Division, First Department, has recently held that

[i]n view of the public policy to permit persons involved in a judicial proceeding to write and speak about it freely among themselves, pertinent statements made in the course of such proceedings are afforded the protection of privilege, "'irrespective of the motive' with which [the statements] are made" (citations omitted). Stated otherwise, the judicial proceedings privilege is extended to pertinent statements made in the course of litigation "no matter how great the personal malice of the writer" (citation omitted).

While it is true that the judicial proceedings privilege may be 'abused,' and, in that event, 'protection is withdrawn' (citation omitted), the authorities make clear that the sole criterion of whether such abuse has occurred is the pertinence of the statement in question

to the proceedings. "It is only when the language used goes beyond the bounds of reason and is so clearly impertinent and needlessly defamatory as not to admit of discussion that the privilege is lost" (citation omitted).

Sexter & Warmflash, P.C. v. Margrave, 38 A.D.3d 163, 172 (1st Dep't 2007). See also, Lacher v. Engel, 33 A.D.3d 10 (1st Dep't 2006).

Based on the papers submitted and the oral argument held on the record on May 2, 2007, this Court finds that the allegations in the complaints are pertinent to the judicial proceedings. Moreover, the statements do not contain language which goes beyond the bounds of reason and are not so clearly "impertinent" or needlessly defamatory as to deprive plaintiffs of the privilege.

Accordingly, the third cause of action is also dismissed, with prejudice and without costs or disbursements.

All parties are directed to appear for a preliminary conference in IA Part 12, 60 Centre Street, Room 341 on August 8, 2007 at 9:30 a.m. Plaintiffs' counsel shall notify all parties of the conference date.

This constitutes the decision and order of this Court.

FILED
Date: July 16, 2007
JUL 20 2007
NEW YORK
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Barbara R. Kapnick
J.S.C.
BARBARA R. KAPNICK
J.S.C.